(2)

No. 04-279

IN THE

Supreme Court of the United States

ANDREW G. MESSINA, JR. and D&G PRODUCTIONS, INC.,

Petitioners,

v.

THE PARISH OF ST. CHARLES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF LOUISIANA, FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT THE PARISH OF ST. CHARLES

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STATEMENT OF THE CASE

I. Introduction

This writ opposition is made on behalf of the Parish of St. Charles. Respondent submits that the Petitioner has not set forth compelling reasons under United States Supreme Court Rule 10 to warrant the granting of its writ application. This is a simple case in which the respondent, a political subdivision of the state of Louisiana, validly exercised its police powers to achieve peace in neighborhoods that were located next to outdoor drinking establishments. This case does not involve respondent regulating or restricting the content of Petitioner's speech or expression. Moreover, this case does not involve respondent taking any of Petitioner's property. The Petitioner's writ application should be denied.

II. Facts and Procedural History

In April 1994, the plaintiff, D&G, through its president Andrew Messina, Jr., leased a building at 20 Avenue of the Oaks, Destrehan, Louisiana for the purpose of operating a wedding reception hall and restaurant. The restaurant and wedding reception hall was known as Messina's Oak Plantation ("Messina's"). In the next three years, business at Messina's steadily grew, having booked wedding receptions almost each weekend. The indoor facility was 3,000 to 4,000 square feet with a maximum holding capacity of 75 people. There was also a considerably larger outdoor tent that could accommodate 250 people. The wedding receptions utilized the outdoor and indoor areas of Messina's, and alcohol was frequently consumed in the outdoor area. Messina's was located within 500 feet of a residential neighborhood.

In 1997, many residential neighbors complained to Messina about the increasing noise levels associated with outdoor alcohol consumption at these wedding receptions. Neighbors reported that the noise continued through midnight and would even shake the tables in their homes. The neighbors and councilman Philips attempted to work with Messina's to lower the noise level. Mr. Messina showed no willingness to compromise and responded to the neighbors and Councilman Philips, "do what you need to do."

At that time in St. Charles Parish, concerns were rampant over alcohol consumption at outdoor drinking establishments because of the increased noise and other associated evils that disturbed the peace in neighborhoods located next to such establishments. In response to those concerns, on August 5, 1997, the Parish Council passed Ordinance #97-8-1 which amended Section 3-6 by eliminating the exemptions that restaurants enjoyed from regulations governing the consumption of alcoholic beverages in outdoor areas. *Contrary to petitioner's representations, D&G was operating under an exemption prior to the passage of the Ordinance. D&G never specifically had a permit to allow its patrons to consume alcohol in the outdoor areas of its premises.*

Specifically, the amendment provided that **negative impacts to adjoining residential areas from outdoor drinking areas at local restaurant establishments** prompted the need to revise the cited restaurant exemption. The amendment provided that a restaurant or barroom proprietor shall file a permit application for outdoor alcoholic beverage consumption with the Director of Planning and Zoning. The Department of Planning and Zoning would then post the applicant's property with notice of the permit request for a five day period. If no negative commentary was received

on the application from any property owner within 500 feet of the applicant's affected property, the director may approve the application, with stated reasons. If negative commentary was received from eligible property owners, the permit application would be forwarded to the Council secretary for consideration by the Parish Council. Also, if the director disapproved the application in the absence of negative comment, the applicant would be able to appeal that decision to the Parish Council.

Although the amendment was passed on August 5, 1997, petitioner deliberately ignored the provisions of the ordinance. Indeed, after the ordinance was passed, D&G kept booking wedding receptions as if it was immune from the provisions of the ordinance. D&G's continued defiance forced sheriff's deputies to physically enforce the ordinance at the facility. D&G finally submitted an application for an outdoor alcohol consumption permit on December 9, 1997, some four months after the passage of the ordinance.

The required notice was posted, and four property owners within the prescribed distance objected to the outdoor alcohol consumption permit on December 15, 1997. These individuals were Huey Long, Leonard Walsten, Denise Walsten, Henry Boudin, and James Waguespack. On January 5, 1998, the permit application was then tabled for consideration by the Parish Council. **The Council heard from Mr. Messina and neighbors who opposed the permit application.** On February 2, 1998, the Parish Council denied petitioner's permit application.

D & G filed an original petition on July 15, 1998, and supplemental petitions on March 1, 2000 and September 20, 2000, asserting equal protection claims, due process claims and a takings claim against respondent for the passage of this ordinance, and the denial of its permit. Respondent filed a Motion for Summary Judgment on January 3, 2003, arguing that plaintiff did not have a vested property right to allow the consumption of alcoholic beverages in the outdoor areas of his business. Moreover, respondent argued that it was within its right to police the outdoor consumption of alcohol at restaurants to rationally achieve the legitimate governmental objective of preserving the peace in adjoining neighborhoods.

On February 10, 2003, the 29th Judicial District Court for the Parish of St. Charles granted Respondent's Motion for Summary Judgment. The trial court held that the Parish's exercise of its police powers in regulating the outdoor consumption of alcoholic beverages at restaurants did not violate the plaintiff's due process, equal protection, and First Amendment rights and did not constitute a taking without just compensation. On March 19, 2003, that Court issued Reasons for Judgment. On December 30, 2003, the Louisiana Fifth Circuit Court of Appeal affirmed. On March 26, 2004, the Louisiana Supreme Court denied the Petitioner's writ application.

REASONS FOR DENYING THE PETITION

Petitioner asserts three reasons to support a granting of its writ application. First, petitioner asserts that the Louisiana Fifth Circuit Court of Appeal erred by failing to render a full opinion that addressed the dispositive issues in this case. Second, petitioner asserts that the Louisiana Fifth Circuit erred by not finding a genuine issue of material fact as to whether respondent violated the petitioner's rights to freedom of expression. Third, petitioner asserts that the Louisiana Fifth Circuit erred by not finding a genuine issue of material fact as to whether the respondent's actions constituted a taking and a violation of the petitioner's substantive due process rights.

D & G's reasons in its Petition for a Writ of Certiorari are meritless. The Petitioner's writ application fails to articulate compelling reasons for the granting of the writ. The Petitioner's reasons do not fall within the considerations set forth in United States Supreme Court Rule 10 for the granting of a writ application. Further, they fall woefully short of making any showing sufficient for this Court to exercise its supervisory jurisdiction. The Petitioner's writ application should be denied.

I. The Louisiana Fifth Circuit Addressed Every Assignment of Error that Petitioner Raised on Appeal.

Contrary to petitioner's assertion, the Louisiana Fifth Circuit rendered an opinion that addressed every assignment of error raised on appeal, including petitioner's pretext argument. On page 6 of its opinion, the court stated "The plaintiffs also contend that the parish council passed the

Ordinance solely to affect Messina's and there was no showing that any restaurant would be affected, **and that it was passed as an unconstitutional pretext to regulate noise.**[1]

In its opinion, specifically the section entitled Substantive Due Process and Equal Protection, the court addressed the pretext argument. Specifically, on page 9 of its opinion, the Louisiana Fifth Circuit opined that the plaintiff had no fundamental right to serve alcoholic beverages. The court stated, "his right to provide alcoholic beverages inside was not revoked by the Ordinance. The Ordinance is merely economic or social regulation. Thus, it need only have a rational relationship to a legitimate governmental interest. **Here, the restriction on alcohol endorses a rational relationship to a legitimate governmental interest, which is to regulate noise nuisance. Based on comments made in the parish council meetings, the parish council concluded that removing the exemption for restaurants was the best way to regulate the noise caused by loud music at outside parties. We find that this is not an unreasonable approach to the problem."** (Emphasis added)

Petitioner's argument that the Louisiana Fifth Circuit's opinion is a gross departure from proper judicial proceedings is completely misplaced. The Louisiana Fifth Circuit held that the subject regulation was a constitutional ordinance that bore a rational relationship to the governmental interest of curtailing substantial noise in residential areas. Therefore, respondent validly exercised its police powers, as articulated by the Louisiana Fifth Circuit in its opinion. Petitioner's first reason for the granting of the writ has no merit, and its application should be denied.

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1. Please see Louisiana Fifth Circuit opinion attached as an appendix to Petitioner's writ application.

II. No Issue of Fact Existed That Respondent Did Not Violate Petitioner's First Amendment Rights.

There was clearly no issue of fact that respondent did not violate petitioner's right to freedom of expression. Respondent may decide the proper legislative ordinance to best protect the public, as long as it is rationally related to that purpose. If an ordinance that involved decibel-counting was not to be the most effective mechanism to preserve peace in areas next to outdoor drinking areas, the respondent is surely free to pass another regulation that serves the legitimate governmental objective. As this Court stated in *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 113 S. Ct. 2096, 2102 (1993), *on remand*, 1993 WL 523834, 1993 U.S. App. LEXIS 34955 (D.C. Cir. Oct. 22, 1993), "A legislative choice is not subject to court-room fact finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 2102.

The subject ordinance is tailored to protect the governmental objective of reducing noise in residential areas, not to curtail the petitioner's first amendment rights. Indeed, D&G was free to hold receptions outside and publicly express its concerns and/or views as long as alcoholic beverages were not consumed outside. *Freedom of speech and outdoor wedding receptions were not the proscribed activities*; the outdoor consumption of alcoholic beverages was the prohibited activity.

The cases that petitioner cites have no similarity to the situation at hand. The *Newport v. Fact Concerts, Inc.*, 626 F.2d 1060 (1st Cir. 1980) case involves issues related to the content of what the rock group, Blood, Sweat and Tears, played at concerts. The restriction was directly related to the

content of the speech or expression by that rock group. Here, the subject ordinance is related to alcohol consumption in outdoor areas, it is not related to the content of any noise. Petitioner's pretext argument is misplaced and does not compel the granting of its writ application.

Moreover, where the governmental interest sought to be regulated is unrelated to suppression of expression, the law will be upheld in certain cases, despite its incidental limitation on expressive activity. *See State v. Larson*, 653 So. 2d 1158, 94-1237 (La. 4/10/95), wherein it was held that a regulation prohibiting public nudity in conjunction with the sale of alcoholic beverages was a reasonable restriction that did not impermissibly curtail First Amendment rights.

Here, the governmental interest sought to be regulated, the outdoor consumption of alcohol in restaurants, is unrelated to the suppression of expression. The passage of the ordinance and denial of the permit application was correctly upheld by the trial court and the Louisiana Fifth Circuit, despite any inadvertent limitation on expressive activity, which did not occur. Petitioner's writ application should be denied.

III. Petitioner Is Unable to Show That Respondent's Actions Constituted a Taking and a Violation of its Substantive Due Process Rights.

Petitioner could not create an issue of fact that respondent's actions did not constitute a taking and/or a violation of its substantive due process rights. The Fifth Amendment prohibition against taking without compensation does not guarantee the most profitable use of the property."[2]

2. *Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070 (5th Cir. 1989).

A diminution in value standing alone, does not establish a taking.[3] The record indicates that petitioner was concerned it would not be as profitable under Ordinance #97-8-1 as it was prior to its passage. Petitioner admitted in his deposition that he was in the wedding hall business to make a big profit, or otherwise he was not going to bother getting involved with this business.

First, petitioner admitted that it knew about the ordinance but failed to comply with it for four months.[4]

> Q. You knew about the ordinance in August of 1997?
>
> A. Absolutely, and when he showed up and brought me that sheet of paper.
>
> Q. So it would be a fair statement to say that, for four months, you were not in compliance with the ordinance, correct?
>
> A. Based on what they were saying.[5]
>
> * * *
>
> Q. Right. I understand. I am just asking specifically about your business, assuming that it would have survived, that you ever t ed to — did you ever give thought to strictly operating as an indoor wedding reception facility?
>
> A. No.

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3. *Id.*

4. Deposition transcript, appendix 2, p. 41, lines 19-25.

5. Appendix 2, p. 42, line 1.

Q. I am just asking you to make an assumption that you would have survived. Did you ever give thought to —

A. No. We didn't open the building predicated on the numbers generated with people in the building. We generated on numbers on making profits with having two, three, four, 500 people, not 50, 60, 70. That was a waste of time, and it wouldn't have paid the bills. . . .

Q. Would it have been profitable to operate in an indoor wedding facility?

A. No, sir.

Q. Why is that, for what specific reason?

A. Well, you look at risk versus reward, it wasn't worth Messina's time and effort. That is number one.

Q. But if you — if you had received high, high volume of indoor wedding receptions, could you have turned a profit, possibly?

A. Possibly, but not to the standards of Messina's.

Q. What are the standards of Messina's?

A. To open up a catering facility and not make, net profit, a $150,000 to $200,000 or higher, there is no need in pursuing it.

Q. So you want to explode as far as profit is concerned?

A. Yes, why do it otherwise? Everything else we're doing is going wonderful. Why go into a venture where you are spinning your wheels?[6]

Similarly, in *Liberto v. Rapides Parish Police Jury*, 667 So. 2d 552, 95-456 (La. App. 3d Cir. 11/2/95), the owner of the club testified that if the ordinance went into effect, he would be unable to continue to operate his club profitably at its current hours of operation. He further stated that no other business except his was discussed at the meeting when the full police jury recommended the new ordinance for passage. The court concluded that the ordinance did not impermissibly interfere with or mandate closure of the business. The business could remain open under the ordinance during its regular hours between 12 midnight and 5 a.m. on weekends. Its patrons, however, could not consume alcoholic beverages between the hours of 2 a.m. and 5 a.m. **The court viewed this limited regulation as necessary to the accomplishment of a proper purpose within the inherent police power of the police jury**.

Petitioner's testimony reveals its desire to make the highest profit possible at the expense of the peace in the surrounding neighborhoods. The Parish Council acted legitimately in enacting an ordinance to preserve neighborhood integrity. Petitioner could not establish issues of fact with respect to any of its claims. The trial court properly entered summary judgment in favor of St. Charles Parish. The Louisiana Fifth Circuit properly affirmed that ruling in every respect. The Louisiana Supreme Court properly denied the writ application. The petitioner has failed to set forth any compelling factors that warrant the granting of its writ application.

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6. Appendix 2, pp. 89, 90, 91.

CONCLUSION

Petitioner has failed to demonstrate that the St. Charles Parish acted arbitrarily or capriciously in passing the subject ordinance and denying the petitioner's permit application. Petitioner was given the opportunity to be heard before the Parish Council on its permit application. The ordinance was passed to preserve the legitimate government objective of preserving the peace in residential neighborhoods that were located immediately next to eating and drinking establishments. The actions at issue were a valid exercise of the state's police powers. Petitioner has failed to set forth any factors that warrant the granting of its writ application. Its writ application should be denied in all respects.

Respectfully submitted,

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APPENDIX

APPENDIX — EXCERPTS OF DEPOSITION OF ANDREW G. MESSINA, JR. DATED MAY 22, 2002

TWENTY-NINTH JUDICIAL DISTRICT COURT
PARISH OF ST. CHARLES
STATE OF LOUISIANA

NO. 50-025

DIV. "E"

ANDREW G. MESSINA, JR., ET AL

VERSUS

THE PARISH OF ST. CHARLES, ET AL

[Commencing at page 41]

Q. Let me show you what I'll mark as Exhibit No. 4.

(The instrument referred to was marked Exhibit 4 for identification and is attached hereto).

BY MR. DABDOUB:

Q. Does that look like a copy-of the application?

A. Yes, Sir.

Q. And is that -- was this completed by you?

A. Yes, Sir.

Q. Is that your signature right there, sir (indicating)?

A. Yes, Sir.

Q. What is the date there?

A. December 8th, 1997.

Q. You knew about the ordinance in August of 1997?

A. Absolutely, when he showed up and brought me that sheet of paper.

Q. So it would be a fair statement to say that, for four months, you were not in compliance with the ordinance, correct?

[42] A. Based on what they were saying.

Q. Just -- I'm just asking based on the time.

MR. VENEZIA:

I'm going to object because I think that that calls for an opinion or ultimate conclusion as to whether he was in compliance with the ordinance or not.

MR. DABDOUB:

Objection noted.

BY MR. DABDOUB:

Q. You knew about the ordinance in August of 1997. Can you tell me why you waited for four months before sending the application in?

A. Yes, sir. At that time, being that I was there for four years, had all my permits, that I was Messina's Oaks Plantation and when I read the ordinance, it said plantations excluded, between the fact I was there four years, between the fact plantations were excluded, I didn't feel like I was -- what is the right word? I didn't feel like I was the one they were looking for to fill it out. So I didn't until the police started showing up.

* * *

[89] * * *

Q. Did you ever try to book future parties to be held indoors?

A. No. How? How?

Q. I'm asking you.

A. No, it was not possible. It was not possible. I had no income coming. I couldn't pay my rent, couldn't pay my electricity, couldn't pay the labor, and, if I book one based on a bride or any person thinking they could be outside for a picnic or a wedding, that is fraud.

Q. Right. I understand. I'm just asking specifically about your business, assuming that it would have survived, did you ever try to -- did you ever give thought to strictly operating as an indoor wedding reception facility?

A. No.

MR. VENEZIA:

I object. I think assuming survival is not what happened, and you're asking him to speculate as to [90] what could have happened in the future.

MR. DABDOUB:

Right.

BY MR. DABDOUB:

Q. I'm just asking you to make an assumption that you would have survived. Did you ever give thought to --

A. No. We didn't open the building predicated on the numbers generated with people in the building. We generated our numbers on making profits with having two, three, four, five hundred people, not fifty, sixty, seventy. That was a waste of time, and it wouldn't have paid the bills.

Q. What was the capacity of the indoor facility?

A. Max?

Q. At max.

A. At max, 75 would have been a serious crowd.

Q. Would it have been profitable to operate an indoor wedding facility?

A. No, Sir.

Q. Why is that, for what specific reason?

A. Well, you look at risk versus reward, [91] it wasn't worth Messina's time and effort. That is No. 1.

Q. But if you -- if you had received high, high volume of indoor wedding receptions, could you have turned a profit, possibly?

A. Possibly, but not to the standards of Messina's.

Q. What are the standards of Messina's?

A. To open up a catering facility and not make, net profit, a hundred fifty, two hundred thousand or higher, there is no need in pursuing it.

Q. So you want to explode as far as profit is concerned?

A. Yes. Why do it otherwise? Everything else we're doing is doing wonderful. Why go into a venture where you're spinning your wheels?

* * * *